No. 12515

Office - Supreme Court, U.S.
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JUN 5 1958
JOHN T. FEY, Clerk

United States Court of Appeals

For the Third Circuit

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

AGAINST

ALBERT BARNETT KLEPPER and EDWARD SCHNUR,

Defendants-Appellants,

AND

TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,

Defendants.

APPEAL FROM JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

APPELLANTS' BRIEF AND APPENDIX

ALBERT BARNETT KLEPPER

and

EDWARD SCHNUR,
Defendants-Appellants,
pro se.
82 Wall Street,
New York 5, N. Y.
DIgby 4-8045.

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Questions Involved

1. Did the District Court of New Jersey commit error in assuming jurisdiction over the *res*, after the institution of a prior pending action in the Supreme Court of the State of New York, County of Kings, in which jurisdiction over the *res* had been secured; and, the state interpleader statute afforded ample relief in a binding action?

2. Did the District Court of New Jersey commit error in retaining jurisdiction, and permanently enjoining New York residents, who did not waive the defense that the Court did not have jurisdiction over them to render judgment *in personam?*

3. As a matter of law and equity did the District Court of New Jersey commit error in disregarding the objections of three of the four defendants to the assumption of jurisdiction; and the fact that the only remaining defendant could receive full payment of its asserted claim?

Statement of Facts

On October 31, 1957, an action was instituted by Albert Barnett Klepper, as assignee of a life insurance policy to recover $25,000.00 against the Manufacturers Life Insurance Company in the Supreme Court of the State of New York, County of Kings.

On November 1, 1957, $25,000.00 in funds of the Manufacturers Life Insurance Company, pursuant to a writ of attachment issued by the Supreme Court of the State of New York, County of Kings were attached.

On November 4th, 1957, the summons and verified complaint in the Supreme Court of the State of New York, County of Kings were served on the Manufacturers Life Insurance Company. The time of the defendant Manufacturers Life Insurance Company to answer the State Court action, has been extended until the determination of the appeal herein.

On November 19th, 1957, the District Court of New Jersey restrained the defendant from prosecuting the pending action in the Supreme Court of the State of New York, County of Kings.

On December 9th, 1957, over the objections of three of the four defendants the District Court of New Jersey, permanently enjoined and restrained the prosecution of the pending State action, and directed interpleader.

On December 13th, 1957, the defendants Albert Barnett Klepper and Edward Schnur, filed notice of appeal and a stipulation extending their time to answer until the determination of this appeal.

Albert Barnett Klepper a New York attorney and Edward Schnur are both residents of the State of New York,

and opposed the assumption of jurisdiction by the District Court of New Jersey, on the grounds that the Supreme Court of the State of New York, County of Kings had jurisdiction over the *res* in a prior pending action, and, the New York interpleader statute afforded ample relief in a binding action. Further, that they did not waive the defense that as residents of the State of New York, the District Court of New Jersey did not have jurisdiction over them to render judgment *in personam*.

Marie M. Constant, likewise opposed and asserted that a second action was improper and unnecessary, especially since the only defendant, Tanner Associates Inc., who desired a second forum, could receive immediate payment in full of its asserted claim.

It is respectfully submitted that in accordance with law, and as a matter of equity, the Court should have vacated the restraining order and dismissed the interpleader.

THE ARGUMENT

POINT I

The State Court first acquired control of the *res*, and, the state interpleader action afforded ample relief.

The plaintiff in his complaint (5a) alleged that its funds in the State of New York were attached, prior to the institution of the action in the District Court, in a pending action in the Supreme Court of the State of New York, County of Kings.

Sections 285, 286 and 287 of the Civil Practice Act of the State of New York, afford ample relief in a binding action (9a).

In *Flanagan* v. *Marvel*, 94 Fed. Supp. 145 the Court vacated and set aside the restraining order heretofore issued, and, dismissed the plaintiff's interpleader holding that the State interpleader action afforded plaintiff ample opportunity for relief in his position as stakeholder, and, there was no equitable basis for assumption of jurisdiction by a Federal Court, stating (p. 148):

> "where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction. Kline v. Burke Construction, 260 U. S. 229, 43 S. Ct. 79, 82."

It is well settled law that where a State Court first acquires control of the *res*, the Federal Courts are disabled from exercising any power over it by injunction or otherwise.

> *Palmer* v. *Texas*, 212 U. S. 118;
> *Tocey* v. *New York Life Insurance Co.*, 314 U. S. 118.

POINT II

The District Court of New Jersey had no jurisdiction over the two New York defendants, who did not waive that defense.

The defendants Albert Barnett Klepper, a New York attorney, and Edward Schnur, both residents of the State of New York, objected to the assumption of jurisdiction by the District Court of New Jersey.

Section 1335, Title 28, U. S. C. A. specifically confers jurisdiction upon the District Courts in interpleader suits.

In *Mosely* v. *Sunshine Biscuits*, 170 F. Supp. 164, the Court construed Sections 28 U. S. C. A., ¤1335, 1397 and

2361 and held the Federal Court in Missouri had no jurisdiction of a New York defendant where the defendant did not waive the defense that the Court did not have jurisdiction of the parties.

In *Hogan* v. *Central Avenue Dairy Inc.*, 180 F. 2d 502, the Circuit Court held that since one of the claimants did not waive, even though the Court did have jurisdiction of the subject matter, the District Court was without jurisdiction of the parties to render a judgment *in personam*, and the motion to dismiss should be sustained.

In *Hogan* v. *Central Avenue Dairy*, 180 Fed. 2d 502 (Circuit Ct., 9th Dist.), raised the scope of the jurisdiction of District Courts in an interpleader action and said:

> "Furthermore, if Congress had so provided there is no reason why process from the United States District Court could not run country-wide. But Congress has not so provided, generally, and a District Court's power, to hear and decide cases involving personal liability of an individual is limited to those served within the state where the court sits."

POINT III

The District Court as a matter of law and equity committed error in disregarding the objections of three of the four defendants, since the fourth defendant's claim of $8,225.83, could be paid from the fund of $25,000.00.

The purpose of 28 U. S. C. A. #1335 was to give a stakeholder protection, by preventing a multiplicity of suits and circuity of action, but in nowise to change rights of claimants by its operation.

New York Life Ins. Co. v. *Lee*, C. A. 9th, 232 Fd. 2d 811;
Federal Rules of Civil Procedure, Rule 22.

Albert Barnett Klepper, Edward Schnur and Marie M. Constant undertook to pay to Tanner Associates Inc., the only remaining defendant the full amount of his asserted claim in the sum of $8,225.83 from the fund of $25,000.00.

It is elementary that to have adverse claims, the claims in the aggregate must exceed the fund that may be available for their payment.

First State Bank of Chariton, Iowa v. *Citizens Bank of Thedford*, 10 F. R. D. 424.

Since the claim of the only defendant who urged the retention of jurisdiction by the District Court, was less than the fund available for its payment, the District Court should have declined jurisdiction, especially since it was aware that the State interpleader statute afforded the stakeholder ample opportunity for relief in a binding action, in which it had already assumed jurisdiction over the *res*.

Flanagan v. *Marvel*, 94 F. Supp. N. J.

Conclusion

The retention of jurisdiction by the District Court of New Jersey and the permanent injunction against the New York residents was arbitrary, clearly erroneous, unsupported by and contrary to the evidence and contrary to law and should be reversed and the interpleader dismissed.

Respectfully submitted,

ALBERT BARNETT KLEPPER
AND EDWARD SCHNUR,
Defendants Pro se.

A

Docket Entries

Civil 1145-57 Docket — Judge Wortendyke

Title of Case

—o—

The Manufacturers Life Insurance Company,
Plaintiff,

vs.

Albert Parnett Klepper, Edward Schnur, Tanner Associates, Inc., and Marie M. Constant,
Defendants.

—o—

Attorneys

For Plaintiff: McCarter, English & Studer, Esqs., 11 Commerce St., Newark

For Defendant: Franzblau & Franzblau, Esqs. (M. M. C.), 60 Park Pl., Newark, Eugene P. Kenny, Esq. (Tanner Associates), 880 Bergen Av., Jersey City, 6

Basis of Action: Interpleader

Date	*Filings—Proceedings*
11-19-57	Complaint filed.
11-19-57	$25,800.00 deposited in Registry.
11-19-57	Clerk's Certificate of Cash Deposit filed.
11-19-57	Temporary restraining order and order to show cause returnable Nov. 25, 1957 filed. (Wortendyke) Notice mailed.
11-19-57	Summons issued.
11-19-57	Notice of Allocation and Assignment filed. (Newark—Wortendyke)
11-27-57	Hearing on plaintiff's application for preliminary injunction. Ordered application grant. Order to be submitted. Ordered hearing continued to 12-9-57. (Wortendyke) (11-25-57)
11-27-57	Affidavit of Alexander J. Alexander filed 11-25-57.
11-27-57	Affidavit of Andrew J. Dritsas filed 11-25-57.

Docket Entries

Date	*Filings—Proceedings*
12- 2-57	Summons returned served on Marie M. Constant on 11-19-57; served Edward Schnur on 11-21-57; served Tanner Associates, Inc., on 11-20-57; returned not served as to Albert Barnett Klepper, filed
12- 4-57	Letter requesting issuance of Alias Summons as to Albert Barnett Klepper, filed
12- 4-57	Alias summons issued as to Albert Barnett Klepper.
12- 4-57	Affidavit of Albert Barnett Klepper, filed
12- 9-57	Answer of Marie M. Constant, filed
12- 9-57	Affidavit of Nathaniel W. Franzblau, filed
12-10-57	Hearing on plaintiff's application to settle form of order for preliminary injunction. (Wortendyke) (12-9-57)
12-10-57	Ordered time to file answers for all claimants be extended to 1-15-58. Order to be submitted. (Wortendyke) (12-9-57)
12-10-57	Alias summons returned served on Albert Barnett Klepper on 12-6-57, filed 12-9-57
12-10-57	Interlocutory judgment discharging plaintiff from all further liability; for permanent injunction without costs; and for payment of Counsel fee out of registry, filed 12-9-57 (Wortendyke) Notice mailed.
12-10-57	Affidavit of Nicholas Conover English, filed 12-9-57
12-16-57	Notice of Appeal as to Albert Barnett Klepper and Edward Schnur filed 12-13-57
12-16-57	Copies forwarded to Clerk, U.S.C.A., McCarter, English & Studer, Esqs., Franzblau & Franzblau, Esqs., and to Eugene P. Kenny, Esq.
12-16-57	Stipulation and order extending time of Albert Barnett Klepper and Edward Schnur to answer until determination of appeal, filed 12-13-57 (Wortendyke) Notice mailed.
1- 6-58	Answer of Tanner Associates, Inc., filed 1-3-58
1-10-58	Record on Appeal forwarded to Clerk, USCA.

APPENDIX

Order to Show Cause and Restraint

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No.

———o———

[SAME TITLE]

———o———

Upon the filing of the complaint herein and the payment into the Registry of this Court by the plaintiff of the sum of $25,000.00, and good cause appearing,

IT IS ORDERED, on this 19th day of November, 1957, on motion of McCarter, English & Studer, attorneys for plaintiff, that the defendants, and each of them, show cause before this Court, at the Federal Building, Newark, New Jersey, at 10 o'clock in the forenoon, on Monday the 25th day of November 1957, why the said defendants should not interplead; why the defendants, their agents and attorneys, should not be permanently restrained and enjoined from instituting or prosecuting any proceeding in any state or United States court affecting said Policy No. 1,254,339 or the proceeds thereof; why the plaintiff should not be discharged of all further liability respecting Policy No. 1,254,339 or the proceeds thereof, and why the plaintiff should not be awarded a counsel fee and its costs to be taxed.

Order to Show Cause and Restraint

AND IT IS FURTHER ORDERED that the defendant Albert Barnett Klepper, his agents and attorneys, be and they hereby are enjoined and restrained from prosecuting the action now pending against plaintiff in the Supreme Court of the State of New York, County of Kings, which action is entitled "Albert Barnett Klepper, Plaintiff against The Manufacturers Life Insurance Company, Defendant" and which bears Index No. 13922, Year 1957, until the further order of this Court.

AND IT IS FURTHER ORDERED that the defendants, Albert Barnett Klepper, Edward Schnur, Tanner Associates, Inc., and Marie M. Constant, and each of them, their officers, agents and attorneys, be and they hereby are enjoined and restrained from instituting or prosecuting any proceeding in any state or United States court affecting said Policy No. 1,254,339 or the proceeds thereof, until the further order of this Court.

AND IT IS FURTHER ORDERED that a true but uncertified copy of the complaint and of this order may be served upon Andrew J. Dritsas, attorney for defendant Albert Barnett Klepper.

REYNIER J. WORTENDYKE, JR.
U. S. D. J.

Done at Newark, N. J.

Nov. 19, 1957 at 10:20 A. M.

Complaint in Interpleader

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No.

—o—

[SAME TITLE]

—o—

Plaintiff, The Manufacturers Life Insurance Company, by way of complaint says that:

1. Plaintiff is a corporation existing under the laws of Canada and is duly qualified to transact the business of life insurance in the State of New Jersey.

2. Defendant Albert Barnett Klepper, upon information and belief, is a resident and citizen of the State of New York and maintains his office at 82 Wall Street, New York City. Defendant Edward Schnur is a resident and citizen of the State of New York and resides at 5114 Beverly Road, Brooklyn, New York. Defendant Tanner Associates, Inc. is a New Jersey corporation and is a citizen of New Jersey having its principal office at 880 Bergen Avenue, Jersey City, New Jersey. Defendant Marie M. Constant is a citizen and resident of New Jersey and resides at 80 Lincoln Avenue, Long Branch, New Jersey.

3. This action arises under 28 U. S. C. § 1335.

4. Under date of July 22, 1953 plaintiff issued its policy No. 1,254,339 in the face amount of $25,000 on the life of

Menander T. Constant as insured. Defendant Marie M. Constant, wife, was designated beneficiary.

5. Under date of February 8, 1956, the insured appointed as beneficiary "Edward Schnur, residing at 5114 Beverly Road, Brooklyn, New York, as first mortgagee." The said Edward Schnur is one of the defendants herein.

6. Under date of February 8, 1956, the said insured and defendant Marie M. Constant executed a written assignment of said policy to "Albert Barnett Klepper, Attorney at Law, 82 Wall Street, New York 5, New York." Said Albert Barnett Klepper is one of the defendants herein.

7. Under date of February 8, 1956 the defendant Albert Barnett Klepper executed a letter to the insured in which he said in part:

> "I have this day received an assignment of policy and the appointment of beneficiary, together with the original life insurance policy issued by the Manufacturers Life Insurance Company, policy #1,254,339, which I will hold in escrow until the repayment in full of a first mortgage to Edward Schnur and a second mortgage to Abraham and Tillie Weiner.
>
> "It being understood that said policy together with the assignment and appointment of beneficiary will be returned to you upon full payment of both of said mortgages."

8. On September 27, 1957, the insured, Menander T. Constant, died.

9. Under date of October 9, 1957, Abraham Weiner and Tillie Weiner executed an assignment to defendant Tanner Associates, Inc. of all their "right, title and interest in and to the proceeds of insurance policy No. 1,254,339 issued by The Manufacturers Life Insurance Company on the life of Menander T. Constant, to whatever extent we may be entitled thereto, which policy is now held in escrow by Albert Barnett Klepper to secure the payment of a first mortgage held by Edward Schnur on the premises on which the within assigned mortgage is a second mortgage, and to secure the payment of the bond and mortgage assigned herein; * * *."

10. Defendant Albert Barnett Klepper as assignee of such policy, acting through his attorney Andrew J. Dritsas, Esq., of 82 Wall Street, New York 5, New York, has filed a complaint in the Supreme Court of the State of New York, County of Kings, against the plaintiff seeking recovery of the proceeds of said life insurance policy. The said action is entitled "Albert Barnett Klepper, Plaintiff, against The Manufacturers Life Insurance Company, Defendant" and bears Index No. 13922, Year 1957. Inasmuch as plaintiff is not qualified to do business in the State of New York and has no agent for the service of process in the State of New York, the said Klepper has attached a bank account of the plaintiff in the First National City Bank of New York, 55 Wall Street, New York 15, New York.

11. Defendant Tanner Associates, Inc., acting through its attorney, Eugene P. Kenny, Esq., of Jersey City, New Jersey, has demanded that plaintiff pay it the sum of $8,225.83, representing its interest in the proceeds of said policy.

Complaint in Interpleader

12. Defendant Marie M. Constant, acting through her attorney, Nathaniel W. Franzblau, of Newark, New Jersey, has made claim to plaintiff of an interest in said policy.

13. Plaintiff herewith tenders into court the sum of $25,000, representing the proceeds payable under said policy.

14. Plaintiff is unable to determine the respective interests of the defendants in the proceeds of said policy, and has no adequate remedy at law save by resort to the equitable powers of this Court under 28 U. S. C. § 1335.

WHEREFORE, plaintiff demands:

A. That this Court issue its process for all defendants.

B. That this Court enter its order restraining and enjoining defendant Albert Barnett Klepper, his agents and attorneys, from prosecuting or otherwise proceeding with his action in the Supreme Court of the State of New York, County of Kings, entitled "Albert Barnett Klepper, Plaintiff against The Manufacturers Life Insurance Company, Defendant" and bearing Index No. 13922, Year 1957" until the further order of this Court, and directing him to release from attachment the funds of plaintiff in the First National City Bank, New York, New York.

C. That this Court enter its order restraining and enjoining the defendants, and each of them, their respective agents and attorneys, from instituting or prosecuting any proceeding in any state or United States court affecting said policy No. 1,254,339, or the proceeds thereof, until the further order of this Court.

D. That upon procuring the defendants to interplead herein, the plaintiff be discharged of all further liability with respect to said policy No. 1,254,339 or the proceeds thereof.

E. That plaintiff be awarded a counsel fee and its costs to be taxed.

McCARTER, ENGLISH & STUDER,
Attorneys for Plaintiff
11 Commerce Street
Newark 2, New Jersey
By JAMES R. E. OZIAS
JAMES R. E. OZIAS,
A Member of the Firm

Affidavit of Andrew J. Dritsas

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145/57

—o—

[SAME TITLE]

—o—

State of New York
County of New York—ss.:

ANDREW J. DRITSAS, being duly sworn, deposes and says:

I am an attorney at law duly admitted to practice in the State of New York, and, in this Court.

I request the Court to vacate and dismiss the temporary restraining order, and, to dismiss the plaintiff's interpleader on the following grounds:

a. The Supreme Court of the State of New York, County of Kings, has already assumed jurisdiction over the res, in a pending action, and the interpleader statutes of the state afford the plaintiff as stakeholder ample relief in a binding action; and there is no equitable basis for assumption of jurisdiction by this Court.

b. Albert Barnett Klepper, a resident of the State of New York, appears specially herein, and does not waive the defense that this Court does not have jurisdiction over him to render a judgment in personam.

The plaintiff in his complaint (P. 10) alleges that its funds in the City of New York have been attached, prior to this interpleader action, in a pending action to recover

the proceeds of the life insurance policy by Albert Barnett Klepper as assignee of such policy.

Sections 285, 286 and 287 of the Civil Practice Act of the State of New York, afford the plaintiff as stakeholder ample relief in a binding action. In the case of Flanagan v. Marvel, 94 Fed. Supp. 145 the Court vacated and set aside the restraining order heretofore issued, and dismissed the plaintiff's interpleader holding that the state interpleader action afforded plaintiff ample opportunity for relief in his position as a stakeholder, and, there was no equitable basis for assumption of jurisdiction by a federal court.

At P. 148:

> "where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction. Kline v. Burke Construction, 260 U. S. 229, 43 S. Ct. 79, 82."

It is well settled law that where a state court first acquires control of the res, the federal courts are disabled from exercising any power over it by injunction or otherwise. Palmer v. Texas 212 U. S. 118; Toucey v. New York Life Insurance Company 314 U. S. 118; Agricultural Insurance Co. v. The Lido, Dist. Ct. Mass. 1945; 28 U. S. C. A. Sec. 379; Moore's Commentary on the U. S. Judicial Code.

Section 1335 Title 28 U. S. C. A. specifically confers jurisdiction upon the district courts in interpleader suits. Section 1397, Title 28 U. S. C. A. provides the venue of such actions as follows:

Affidavit of Andrew J. Dritsas

> "Any civil action of interpleader, or in the nature of interpleader under section 1355 of this title *may be brought*, in the judicial district in which one or more defendants reside."

In Mosely v. Sunshine Biscuits, 170 F. Supp. 16 the court construed sections 28 U. S. C. A., # 1335, 1397 and 2361 and held the Federal Court in Missouri had no jurisdiction of a New York defendant where the defendant did not waive the defense that the court did not have jurisdiction of the parties. The Circuit Court in the case of Rogan v. Central Avenue Dairy Inc. 180 F 2d 502, held that since one of the claimants did not waive, even though the court did have jurisdiction of the subject matter, the District Court was without jurisdiction of the parties to render a judgment in personam, and the motion to dismiss should be sustained. In Hogan v. Central Avenue Dairy 180 Fed 2d 502 the U. S. Circuit Ct. of Appeals 9th Dist, raised the scope of jurisdiction of district courts in an interpleader action, and said:

> "Furthermore if Congress had so provided there is no reason why process from the United States District Court could not run countrywide. But Congress has not so provided, generally, and a District Court's power to hear and decide cases involving personal liability of an individual is limited to those served within the state where the court sits."

WHEREFORE, I respectfully move this Court to vacate and dismiss the temporary restraining order, and to dismiss the plaintiff's interpleader with costs.

ANDREW J. DRITSAS

(Sworn to by Andrew J. Dritsas, November 21, 1957.)

Affidavit of Nathaniel W. Franzblau

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145—57

—o—

[SAME TITLE]

—o—

State of New Jersey
County of Essex—ss.:

NATHANIEL W. FRANZBLAU, being duly sworn, deposes and says:

1. I am an attorney at law of the State of New Jersey with offices at 60 Park Place, Newark, New Jersey and represent the above named defendant Marie M. Constant.

2. On September 27, 1957, Menander T. Constant, husband of Marie M. Constant, died and there was issued on his life an insurance policy in the face amount of $25,000.00 by the plaintiff company, and said Marie M. Constant was designated as beneficiary upon its issue. However, on February 8, 1956, the decedent and said beneficiary agreed to have Edward Schnur designated as beneficiary and executed an absolute assignment of the funds of the said policy to Albert Barnett Klepper, one of the defendants herein, which assignment was filed with and on the regular form of the plaintiff company. The decedent, Marie M. Constant and said assignee agreed that any funds realized from said life insurance policy was to be utilized

as collateral security for the satisfaction of a first mortgage held by said Edward Schnur and a second mortgage held by Abraham Weiner and Tillie Weiner. The said agreement was only for the benefit of the said first and second mortgagees. On October 29, 1957, subsequent to the death of Menander T. Constant, the defendant Tanner Associates, Inc., paid the full amount of the second mortgage to Abraham Weiner and Tillie Weiner and the mortgage was assigned to Tanner Associates, Inc. who, according to the Complaint filed in this cause, alleges that there is due thereon the sum of $8,225.83; that moreover, the said mortgage is in the process of foreclosure but its sale has been postponed on numerous occasions by the said Tanner Associates, Inc. without any cause. At the present posture of this matter, there is no deficiency on the aforesaid mortgages because the said mortgagees have not exhausted their remedies under the terms thereof and if there is any claim that the said mortgagees may have against the funds of the insurance policy it may be asserted against the assignee, Albert Barnett Klepper, when and if a deficiency is properly established by the duly prosecution of foreclosure suits and sales pursuant therewith.

3. Subsequent to the death of the said decedent this deponent communicated with the plaintiff company and after correspondence and conferences with its representatives acknowledged that payment should be made by it to Edward Schnur and Albert Barnett Klepper. In fact, such attitude is exemplified by a letter dated October 22, 1957, a copy of which is annexed hereto, forwarded by this deponent to the plaintiff company at its home office in Toronto, Canada and to Mr. Barrett at its office in Newark, New Jersey.

Affidavit of Nathaniel W. Franzblau

4. On behalf of the defendant Marie M. Constant I have acknowledged that payment should be made to Albert Barnett Klepper and or Edward Schnur the defendants herein because the plaintiff company had received an outright assignment to them of the funds of the policy upon the death of said Menander T. Constant. I informed the plaintiff company and its representatives that I had no objections to the payment of the said $25,000.00 accordingly; moreover, that Marie M. Constant and Tanner Associates, Inc. would have to make their claims, if any, to the defendants, Albert Barnett Klepper and Edward Schnur.

5. Subsequent to my letter of October 22, 1957 and conferences had with the plaintiff's representatives, I was surprised to learn that the plaintiff failed and refused to make payment to Albert Barnett Klepper and or Edward Schnur and as a result thereof the defendant Albert Barnett Klepper instituted an attachment suit in the Supreme Court, Kings County of the State of New York wherein I am reliably informed all the parties may assert their rights or claims. On behalf of said Marie M. Constant I refused to waive the jurisdiction of the Supreme Court of the State of New York because in my opinion it had proper jurisdiction and that the Interpleader Suit filed in this Court was unnecessary and it will cost all of the parties much additional expense and create a diminution of the funds now attached to the detriment of the parties entitled to the funds.

6. On several occasions, for the sake of expediency, this deponent has offered to Tanner Associates, Inc. the amount it claims due on the said second mortgage upon execution by it of an assignment of said mortgage and

the last such offer was made on November 25, 1957. In conjunction therewith deponent also offered to Tanner Associates, Inc., with the consent of all of the other defendants in this cause, that the payment of the amount claimed due on the second mortgage be paid out of the insurance funds upon the execution of an assignment of the mortgage. All of these offers were rejected.

7. This deponent was introduced to a Mr. Burke by his attorney Mr. Kenny and was informed by both of them that Mr. Burke is a member of the bar and a resident of the State of New York and was actually the owner of Tanner Associates, Inc.

8. On behalf of the defendant Marie M. Constant, virtually the only defendant resident of New Jersey, the deponent has and is willing to have the Supreme Court of New York adjudicate the entire matter because it had jurisdiction prior to the United States District Court of New Jersey, had possession of the funds by attachment and said funds will not be charged with substantial unnecessary legal expenses and costs.

NATHANIEL W. FRANZBLAU
NATHANIEL W. FRANZBLAU

(Sworn to by Nathaniel W. Franzblau, December 5, 1957.)

Letter, Annexed to Affidavit

October 22, 1957

The Manufacturers Life Insurance Company
Toronto,
Canada

Re: Policy No. 1,254,339
Menander Constant

Attn: Mr. Thompson, Associate Manager
Claims Department

Dear Mr. Thompson:

I received your letter, dated October 17, this morning, in regard to the above matter.

I have been advised by Mr. Barrett, of your Newark office, that your company would only recognize Albert Barnett Klepper as the beneficiary and assignee of said policy and would make payment to him. In fact, upon receipt of your letter of October 17th, I saw Mr. Barrett, (this morning), and he admitted that was the information he furnished to me. Frankly, I fully realized that that was the only position that your company could take in the matter.

I am now surprised to learn that consideration is being given to a letter written by Mr. Kenny on behalf of Tanner Associates, Inc. If any agreement for collateral security existed in favor of the former mortgagee, it was a personal covenant and certainly does not enure for the benefit of Tanner Associates, Inc.

In your letter, you speak of an Escrow Agreement, and I would be very grateful if you could send me a copy of

that agreement. Any collateral agreement given to the former mortgagee was a personal agreement between the parties and the assignment of the mortgagee would not include any benefits to Tanner Associates, Inc. from the funds of this policy.

Will you please let me hear from you at your earliest convenience.

Very truly yours,

NWF:ama
C.C.—Mr. Barrett

Affidavit of Alexander J. Alexander

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action File No. 1145—57

—o—

[SAME TITLE]

—o—

State of New Jersey
County of Hudson—ss.:

ALEXANDER J. ALEXANDER, being duly sworn according to law upon his oath deposes and says:

1. I am Vice President of Tanner Associates, Inc., one of the defendants herein and authorized to make this affidavit on its behalf.

2. On February 8, 1956, in order to further secure two mortgage debts which he then owed, one to the defendant herein, Edward Schnur, and one to Abraham and Tillie Weiner, Menander T. Constant absolutely assigned a life insurance policy which was then outstanding on his own life with The Manufacturers Life Insurance Company to Albert Barnett Klepper, one of the defendants herein. The said Albert Barnett Klepper at the same time delivered a letter to Menander T. Constant setting forth the terms on which he received such assignment and appointment of beneficiary. A photostatic copy of such is annexed hereto.

Affidavit of Alexander J. Alexander

3. On October 9, 1957 the aforementioned Abraham and Tillie Weiner assigned all their right, title and interest in the aforesaid mortgage debt, and their interest in the proceeds of such insurance policy, to Tanner Associates, Inc.

4. The said Menander T. Constant died on September 27, 1957 and the proceeds of said policy, in the sum of $25,000. are now fully due and payable.

5. At a conference which I attended in the office of Albert Barnett Klepper, defendant herein, the said Albert Barnett Klepper stated that he did not intend to disburse the proceeds of said insurance policy according to the terms on which he received the assignment of the policy but on the contrary intended to disburse them to some clients of his who were unsecured creditors of the decedent, Constant.

ALEXANDER J. ALEXANDER

(Sworn to by Alexander J. Alexander, November , 1957.)

Affidavit of Albert Barnett Klepper, in Opposition

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145/57

—o—

[SAME TITLE]

—o—

State of New York
County of New York—ss.:

ALBERT BARNETT KLEPPER, being duly sworn, deposes and says:

That he is an attorney at law with offices at 82 Wall Street, New York 5, New York, and resides at 1306 East 54th Street, in the Borough of Brooklyn, County of Kings and State of New York.

That on or about November 19, 1957, your deponent's attorney, Andrew J. Dritsas, informed your deponent that he found on his desk a copy of an order to show cause dated November 19, 1957, signed by Hon. Reynier J. Wortendyke, Jr., and a copy of a complaint in interpleader.

That at no time was any process ever served upon your deponent.

No Summons was ever served upon deponent or upon his attorney, Andrew J. Dritsas, except the aforementioned papers which were left on your deponent's attorney's desk.

Your deponent as a resident of the State of New York, does not waive the defense that this Court does not have jurisdiction over him to render judgment in personam; and, asserts there is no equitable basis for the assumption

of jurisdiction by this Court since the Supreme Court of the State of New York, County of Kings has already assumed jurisdiction in a pending action and the interpleader statutes of the State afford the plaintiff as stakeholder ample relief in a binding action.

As a matter of law and as a matter of equity, the Federal Court should decline jurisdiction in view of the following:

That your deponent instituted an action by his attorney, Andrew J. Dritsas, in the State of New York, County of Kings, on October 31, 1957. That on November 1, 1957 the res to wit the sum of $25,000.00 was attached in the action wherein your deponent, as assignee of the proceeds of the Life Insurance policy in the sum of $25,000.00 sought judgment against The Manufacturers Life Insurance Company, the plaintiff in this action. That after the levy was made upon the proceeds of the life insurance policy in the sum of $25,000.00, the plaintiff in this action was served with a summons and verified complaint at Newark, New Jersey on the 4th day of November, 1957.

It is respectfully submitted that said plaintiff in this action could have if it wishes to act in good faith appear in the New York action and obtain whatever equitable relief it desired in the interpleader statutes provided for by the Civil Practice Act of the State of New York.

It is significant to note that orally and in writing Mr. Barrett, the secretary of the Newark office of The Manufacturers Life Insurance Company assured deponent that a check was being mailed in the sum of $25,000.00 up to October 31, 1957. On that date for the first time deponent was informed that The Manufacturers Life Insurance Company had a received a communication in behalf of Tanner

Associates, Inc. by a Mr. Kenny, making a contingent claim of $8,225.83.

To further demonstrate the bad faith of the plaintiff in this action and Tanner Associates, Inc., one of the defendants herein, the fact is undisputed that Eugene P. Kenny, Esq., the attorney for Tanner Associates, Inc., refused to accept the sum of $8,225.83, which was offered to it by Mr. Franzblau, the attorney for Marie M. Constant.

Perusing paragraph "11" of the plaintiff's complaint, the only claim the defendant makes is $8,225.83, and the defendant, Marie M. Constant is willing to make such payment to the defendant Tanner Associates, Inc., the only claimant herein, the sum of $8,225.83 forthwith in exchange for an assignment of a mortgage which Tanner Associates, Inc. now holds.

The refusal to accept this offer by Tanner Associates, Inc. is indicative of their bad faith and this fact is additional ground for the Court in a proper exercise of discretion to refuse to burden deponent with prosecuting two actions, when in fact no one can be prejudiced by the continuation of the prior action now pending in the Supreme Court, State of New York, County of Kings.

It would seem that this Court should decline to invoke its equitable powers by virtue of the fact that three of the four defendants object to the interpleader suit in this Court, and the only defendant desiring that this Court retain jurisdiction, is the defendant Tanner Associates, Inc., a claimant with a tenuous claim.

It is submitted that this Court should give recognition to the number of the defendants objecting to this Court retaining jurisdiction as well as to the amounts involved.

Affidavit of Albert Barnett Klepper, in Opposition

Pro arguendo that Tanner Associates, Inc.'s claim is valid. According to the pleadings before this Court its claim is $8,225.83, and the subject matter in its entirety is $25,000.00. Therefore at least the three defendants represent $16,774.17 who object to the retention of jurisdiction by this Court: and as a matter of fact that there is no bonafide controversy in so far as Tanner Associates, Inc. is concerned, since the defendant Marie M. Constant by her attorney on November 25, 1957 made an offer before the Court to pay in full the alleged claim of the defendant Tanner Associates, Inc.

It is submitted that the proceeds of the insurance policy in the sum of $25,000.00 should not be reduced by having the res subjected to two sets of costs in the two different jurisdictions.

If this Court intends to sign an order retaining jurisdiction and restraining your deponent, then in that event it is requested that this Court in its order make provision extending the time to answer the complaint herein until the determination by the United States Court of Appeals Third Circuit. Within three days after the entry of the order by this Court a notice of appeal will be filed and the appeal prosecuted with dispatch. Therefore it is submitted that no one can complain of any prejudice.

WHEREFORE on the facts as outlined above, it is respectfully submitted that this Court should vacate and dismiss the temporary restraining order and the plaintiff's interpleader should be dismissed with costs.

ALBERT BARNETT KLEPPER

(Sworn to by Albert Barnett Klepper, December 3, 1957.)

Interlocutory Judgment of Interpleader Appealed From

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145—57

—o—

[SAME TITLE]

—o—

This matter coming on to be heard on the return of the order to show cause herein dated November 19, 1957, and upon due notice to the defendants, and good cause appearing,

IT IS ORDERED, on this 9th day of December, 1957, on motion of McCarter, English & Studer, attorneys for plaintiff:

1. That the defendants interplead.

2. That the plaintiff be and it hereby is discharged from all further liability with respect to Policy No. 1,254,339, issued by plaintiff under date of July 22, 1953 on the life of Menander T. Constant, as insured, or the proceeds thereof.

3. That defendant Albert Barnett Klepper, his agents and attorneys, be and they hereby are permanently enjoined and restrained from prosecuting the action now pending against plaintiff in the Supreme Court of the State of New York, County of Kings, which action is entitled "Albert Barnett Klepper, Plaintiff against The

Manufacturers Life Insurance Company, Defendant" and which bears index No. 13922, Year 1957.

4. That defendants Albert Barnett Klepper, Edward Schnur, Tanner Associates, Inc., and Marie M. Constant, and each of them, their officers, agents and attorneys, be and they hereby are permanently enjoined and restrained from instituting or prosecuting any proceeding in any state or United States court affecting said Policy No. 1,254,339 or the proceeds thereof.

5. That plaintiff be allowed a counsel fee of Five Hundred Dollars to be taxed out of the fund in court, and that the Clerk of this Court be and he hereby is directed to pay said counsel fee and costs out of the funds deposited in the registry of this Court to the plaintiff's attorneys, McCarter, English & Studer.

WORTENDYKE, JR.
U. S. D. J.

That the time of the defendants Albert Barnett Klepper and Edward Schnur, defendants herein to answer the complaint be extended to 20 days after the determination by the U. S. Circuit Ct. of Appeals of the appeal by said defendants from this order.

Notice of Appeal

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1145—57

—o—

[SAME TITLE]

—o—

SIRS:

PLEASE TAKE NOTICE that the defendants herein Albert Barnett Klepper and Edward Schnur, hereby appeal to the United States Court of Appeals for the Third Circuit from the judgment of this Court entered December 9, 1957 in favor of the plaintiff, interpleading the defendants, and permanently enjoining and restraining the defendant Albert Barnett Klepper and his attorneys from prosecuting the action now pending against plaintiff in the Supreme Court of the State of New York, County of Kings, and from each and every part of said judgment as well as the whole thereof.

Dated: New York, December 12, 1957.

Yours, etc.,

ALBERT BARNETT KLEPPER

and

EDWARD SCHNUR,
Defendants Pro Se,
82 Wall Street,
New York 5, New York.

To:

McCarter, English & Studer, Esqs.
Attorneys for Plaintiff,
11 Commerce Street,
Newark 2, N. J.

Nathaniel W. Franzblau, Esq.
Attorney for Defendant
Marie M. Constant,
60 Park Place,
Newark 2, N. J.

Eugene P. Kenny, Esq.
Attorney for Defendant
Tanner Associates Inc.,
880 Bergen Avenue,
Jersey City 6, N. J.

Clerk of the United States District Court
for the District of New Jersey.

No. 1018

Office Supreme Court, U.S.
FILED
JAN 5 1959
JAMES T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12515

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

against

ALBERT BARNETT KLEPPER and EDWARD SCHNUR,

Defendants-Appellants,

and

TANNER ASSOCIATES, INC.,

Defendant-Appellee,

and

MARIE M. CONSTANT,

Defendant.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Sat Below: Wortendyke, Jr., U.S.D.J.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLEE, TANNER ASSOCIATES, INC.

ABE A. SCHULTZ,
Attorney and Counsel for Defendant-Appellee, Tanner Associates, Inc.,
880 Bergen Avenue,
Jersey City, New Jersey.

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Letter of February 8, 1956, Annexed to Affidavit Submitted by Defendant Tanner Associates, Inc. 1a

Counter-Statement of Questions Involved

1. Did the District Court of New Jersey properly assume jurisdiction in this action of interpleader after the institution of an action by attachment, by one of the defendants-appellants herein, against the plaintiff in interpleader, in the Supreme Court of New York on the obligation which is the subject of the interpleader?

2. Under the Federal Interpleader Act does the District Court of New Jersey have jurisdiction over New York residents?

3. Where, after the complaint in interpleader was filed and a restraint issued, did the District Court properly overrule the objections to its jurisdiction by 3 of the 4 defendants who agreed to make a conditional payment to the fourth defendant of its interest in the fund?

Counter-Statement of the Case

For a correct understanding of the position of the defendant, Tanner Associates, Inc. with reference to the proceeds of the insurance policy which is the subject of this litigation, a comprehensive statement of the relations of the parties hereto with the insured is necessary.

On July 22, 1953, the plaintiff-appellee, The Manufacturers Life Ins. Company, issued its policy No. 1,254,339 in the face amount of $25,000.00 on the life of Menander T. Constant as insured. Marie M. Constant, the wife of the said Menander T. Constant, and one of the defendants herein, was named revocable beneficiary thereof.

On October 28, 1955, Hadji Realty Corporation, a New Jersey corporation, being indebted to Edward Schnur, one of the defendants-appellants herein, in the sum of $28,000.00 delivered to him a first mortgage, in that amount, covering a parcel of real estate in the Township of Ocean, Monmouth County, New Jersey.

At this time, and up until the time of his death, the said Menander T. Constant was the President, and the said Marie M. Constant was the Secretary of Hadji Realty Corporation, and between them they owned substantially all the stock of said corporation.

On January 6, 1956 the said Hadji Realty Corporation conveyed, by deed, its interest in the aforementioned property, on which the defendant-appellant, Schnur, was given the mortgage, to Elberon Estates, Inc., a New Jersey corporation. The said Menander T. Constant was the President and the said Marie M. Constant was the Secretary of said Elberon Estates, Inc. and between them they owned substantially all the stock of said corporation.

On February 8, 1956, the said Elberon Estates, Inc., being indebted to Abraham Weiner and Tillie Weiner in the

sum of $10,000.00 executed and delivered to them, to secure such debt, a second mortgage on the aforementioned property in Ocean Township, Monmouth County, New Jersey. The said Menander T. Constant and the said Marie M. Constant personally guaranteed the payment of such debt to the Weiners.

On the same day, February 8, 1956, for good consideration, the said Menander T. Constant revoked the appointment of Marie M. Constant as beneficiary of the above mentioned insurance policy and in her place and stead appointed the defendant, Edward Schnur, "as first mortgagee".

On the same day, February 8, 1956, the said Menander T. Constant executed a written assignment of said policy, absolute in form, in which assignment the defendant, Marie M. Constant joined, to Albert Barnett Klepper.

On the same day, February 8, 1956 the said Albert Barnett Klepper executed and delivered to the said Menander T. Constant and Marie M. Constant a written statement in which he acknowledged that the assignment of the above mentioned policy was made to him in trust to secure the payment of the above mentioned first mortgage to Edward Schnur and the above mentioned second mortgage to Abraham and Tillie Weiner. (See copy of same in Appendix.)

On May 22, 1956, Elberon Estates, Inc. being indebted to the defendant, Tanner Associates, Inc. in the sum of $12,000.00 executed and delivered to Tanner Associates, Inc., to secure such debt, a third mortgage on the above mentioned property in Ocean Township, Monmouth County, New Jersey. The said Menander T. Constant and the said Marie M. Constant personally guaranteed payment of the said debt to Tanner Associates, Inc.

On September 27, 1957 the insured, Menander T. Constant died domiciled in New Jersey and hopelessly insol-

vent, and the face amount of said insurance policy became fully due and payable.

On October 9, 1957 the defendant, Tanner Associates, Inc., in order to prevent its third mortgage interest on the above mentioned property from being foreclosed, in consideration of the sum of $8,225.83 took an assignment of the bond and mortgage held by the said Abraham Weiner and Tillie Weiner, together with an assignment of all the right, title and interest of the said Abraham Weiner and Tillie Weiner in and to the proceeds of the above mentioned insurance policy.

The defendant, Albert Barnett Klepper, is a member of the New York Bar and together with Andrew Dritsas, Esq. of the New York Bar (who appeared for Schnur in the present action in the United States District Court) represented the defendant, Edward Schnur, and the aforementioned Abraham Weiner and Tillie Weiner, and others in their various transactions with the decedent, Menander T. Constant, and the defendant, Marie M. Constant and the corporations controlled by them.

After the death of the said Menander T. Constant, the said Albert Klepper stated, in the presence of numerous witnesses, that he did not propose to disburse the proceeds of the said insurance policy in accordance with the terms of the trust on which the policy was assigned to him but that he intended to distribute them to various unsecured creditors of the decedent who were clients of his.

On October 10, 1957, to forestall such violation of trust by the defendant, Albert Barnett Klepper, this defendant directly made demand upon the plaintiff, The Manufacturers Life Insurance Company, for the payment of the sum of $8,225.83 representing its interests from the proceeds of such policy.

Subsequently, on November 1, 1957 the defendant, Albert Barnett Klepper, commenced an attachment action in

the Supreme Court of New York, Kings County, with the objective of securing the proceeds of the policy and distributing them in a manner violative of his trust.

On November 19, 1957 the District Court of New Jersey restrained the defendant Klepper from prosecuting the pending attachment action in the Supreme Court of the State of New York.

On December 9, 1957 the District Court of New Jersey permanently enjoined the prosecution of the attachment action in New York and directed interpleader.

During the argument on the rule to show cause before the District Court the defendants, Klepper, Schnur and Constant offered to pay to this defendant, Tanner Associates, Inc., that portion of the insurance proceeds which it claimed but only on condition that it assign the original Weiner mortgage to the defendant Marie M. Constant. This defendant refused such offer on these grounds: (1) It denies that the defendant, Marie M. Constant, would be the proper party to receive such assignment in the event of such payment to it on the ground that whatever interest she had in such policy as revocable beneficiary terminated when the decedent revoked her appointment as beneficiary and substituted the defendant, Edward Schnur, in her stead, and when the assignment, absolute in form but subject to the trust agreement, was made to Klepper. The proper party to receive such assignment in the event of payment to this defendant would be the Estate of Menander T. Constant; (2) it has good reason to believe that such offer was made as a result of collusion between the said defendants with the object of prejudicing this defendant in its attempts to collect the moneys due to it from the estate of the said Menander T. Constant, the defendant, Marie M. Constant and Elberon Estates, Inc.; (3) this defendant claims an equity to see that the proceeds of such policy are paid to those who are equitably entitled

to the same. The defendant, Albert Barnett Klepper, has absolutely no beneficial interest in the proceeds of the policy and his objective in securing them is to use them to pay off the claims of other unsecured creditors of the decedent, Menander T. Constant, and the defendant, Marie M. Constant, who are clients of his, to the damage of this defendant.

The value of the above mentioned property in Ocean Township, New Jersey, is clearly insufficient to satisfy the liens of the aforesaid three mortgages thereon and the accumulated real property taxes.

This defendant reserves the right to make a motion, on the day set for the oral argument of ths appeal, to expunge the affidavit of Nathaniel W. Franzblau, which is set forth on page 11a of the Appellants' Appendix, from the record of this case on the ground that this defendant never received a copy of the same and, consequently, never had an opportunity to answer it. It was filed with the District Court without this defendant's knowledge.

ARGUMENT

POINT I

The District Court properly assumed jurisdiction herein since the State court action was not *in rem* but *in personam*.

The action which the defendant-appellant, Klepper, brought in the Supreme Court of New York against the plantiff herein, The Manufacturers Life Insurance Company, was strictly for a money judgment. He sought, as assignee of the policy on the life of Menander T. Constant, to collect the proceeds of the policy then due. The insurance company was the only defendant named in the cause. No attempt was made to make Edward Schnur, Marie M. Constant or this defendant parties to that action. The fact that, since The Manufacturers Life Insur-

ance Company was not a resident of New York, the defendant-appellant, Klepper, was obliged to proceed against it by process of attachment, did not convert this *in personam* action for a money judgment into an action *in rem*. As was said by the Supreme Court of the United States in *Freeman* v. *Alderson*, 119 U. S. 185:

> "There is a large class of cases which are not strictly actions in rem but are frequently spoken of as actions quasi in rem because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are the actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things from actions which are strictly in rem in that the interest of the defendant is alone sought to be affected, that citation to him is required and that judgment therein is only conclusive between the parties."

In *National Fire Insurance Company* v. *Sanders et al.*, 38 F. 2d 212 (5th Cir. 1930) the Court of Appeals was called upon to consider the propriety of the judgment of the Texas District Court dismissing the insurance company's complaints in interpleader where, prior to the institution of the interpleader suit, one of the defendants had commenced an action against its co-defendant, Sanders, by an attachment in an Illinois court, garnisheeing the proceeds of the insurance policies upon which was founded the interpleader action. The District Court held that the Illinois court had acquired jurisdiction of the *res*

by the attachment action and that, consequently, the Federal court was without jurisdiction to afford the plaintiff any relief through interpleader. In reversing this judgment of the District Court, the Court of Appeals said:

> "If the Illinois suit were truly an action in rem it would be different as its judgment would conclude the world, but an attachment through garnishment is only quasi in rem. What was attached was a credit and not any particular fund or tangible property of any kind. The suit against Sanders was in personam though quasi in rem to the extent that the judgment could be satisfied only out of the property attached. Any judgment to be rendered against appellants (insurance companies) as garnishees would be a personal judgment to be satisfied out of any of their property and not out of any particular fund or segregated property."

To the same effect see: *Metropolitan Life Insurance Company* v. *Skov*, 45 F. Supp. 140 (Dist. Ct. of Ore., 1942), and *Cramer* v. *Phoenix Mutual Life Insurance Company*, 91 F. 2d 141 (8 Cir. 1937). The facts in this latter case bear a striking similarity to the facts in the case at bar.

In the light of these authorities it is idle for the appellants to contend that the defendant-appellant's, Klepper's action for a money judgment against the plaintiff herein in the New York court assumed the character of an *in rem* action because it was commenced by attachment. Any judgment which he might recover in that action against the plaintiff-appellee herein would be binding only on such plaintiff-appellee and then only to the extent of the funds in the hands of the garnishee belonging to the plaintiff-appellee. It would have no effect whatever on the claims of the other defendants herein against the proceeds of this policy. They would be free to proceed in the New Jersey courts to assert their claims and the plaintiff-appellee

would thereby be exposed to a double liability on the one obligation, a situation which the Federal Interpleader Act was expressly designed to correct.

POINT II

The State court of New York could not afford ample relief to the parties.

Assuming, *arguendo*, that the defendant-appellant's, Klepper's action for a money judgment against the plaintiff-appellee were, through a counterclaim by the plaintiff-appellee, converted into an interpleader action, still the New York court would be in no position to afford complete relief, for in New York, as elsewhere, an interpleader action is held to be *in personam* and not *in rem*.

In *Hanna* v. *Stedman*, 230 N. Y. 326, 130 N. E. 566—the New York Court of Appeals was called upon to judge the validity of a judgment in an interpleader action involving the proceeds of an insurance policy, where one of the defendants resided in New York and the other defendants were non-residents. The non-residents were served by publication but did not appear. In holding such judgment not binding on the non-resident defendants the Court said:

> "An action or proceeding in rem has for its subject specific property which is within the jurisdiction and control of the Court to which application for relief is made. The action proceeds against specific property and its object is to have the Court define the rights therein of various and conflicting claimants. Jurisdictional control of the property affords the basis for service beyond its jurisdiction upon those who may be interested in its disposition. The result of such an action is a judgment which operates upon the property and which has no element of personal claim or personal liability. There is no authority, so far as we are aware, holding that an action of interpleader is

one in rem but exactly the opposite view has been entertained. N. Y. Life Insurance Co. v. Dunlevy, 241 U. S. 518."

Since the New York Court lacks the power to compel the claimants herein, who are residents of New Jersey, to submit to its jurisdiction, any judgment which it would render in the premises would not be binding upon them.

POINT III

Under the Federal Interpleader Act the District Court of New Jersey has jurisdiction over the defendants-appellants who are New York residents.

One does not have to look any further than the terms of the statute itself to see that the District Court of New Jersey had ample power to subject the defendants-appellants to its jurisdiction.

Title 28, Sec. 2361 of the U.S.C.A., states:

"In any civil action of interpleader or in the nature of interpleader, under Sec. 1335 a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or U. S. Court affecting the property, instrument or obligation involved in the interpleader action until further order of the Court. Such process and order shall be returnable at such time as the Court or judge thereof directs and shall be addressed to and served by the United States marshalls for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the Plaintiff from further liability, make the injunction permanent and make all appropriate orders to enforce its judgment." (June 25, 1948, C. 646, ≡1, 62 Stat. 970; May 24, 1949, C. 139, ≡117, 63 Stat. 105.)

Title 28, Sec. 1397 of the U.S.C.A., states:

> "Any civil action of interpleader or in the nature of interpleader under Sec. 1335 of this Title may be brought in the Judicial District in which one or more of the claimants reside." (June 25, 1948, C. 646, #1, 62 Stat. 936.)

Were the words of the statutes not sufficiently explicit and convincing on this question, the numerous decisions affirming the Federal Courts' jurisdiction in this situation can leave no doubt as to its existence. *Metropolitan Life Insurance Company* v. *Skov, supra; Treinies* v. *Sunshine Mining Company*, 308 U. S. 66 (1939); *Cramer* v. *Phoenix Mut. Life Insurance Company*, 91 F. 2d 141 (8 Cir. 1937), cert. den. 302 U. S. 739, 778; *Maryland Casualty Co.* v. *Glassell-Taylor and Robinson*, 156 F. 2d 519 (5 Cir. 1946); *Dugas* v. *American Surety Co.*, 300 U. S. 414 (1937).

In the light of the statutes and the decisions defining jurisdiction in interpleader, it is plain that the jurisdiction of the court extends anywhere in the United States. Consequently, the defendants-appellants' objection to the jurisdiction of the District Court is nothing less than frivolous.

POINT IV

The District Court did not commit error in disregarding the objections of three of the four defendants to the assumption of jurisdiction, although the said three defendants agreed to make a conditional payment in full to the fourth defendant, who refused to accept the same.

The objectives which were sought through the enactment of the Federal Interpleader Act were succinctly stated by Judge Maris in *Metropolitan Life Insurance Co.* v. *Segaritis*, 20 Fed. Supp. 739, 741 (E. D. Pa. 1937):

> "The purpose of the statute is to give the stakeholder protection where adverse claimants reside in different states and to protect the stakeholder as much from the hazards of costs of defending twice as from the danger of double liability."

It is clear, therefore, that sympathy for the stakeholder was the primary objective in mind in the enactment of this legislation. Now, prescinding for the moment from a consideration of the qualified nature of the offer made to this defendant, would not the District Court be flouting the design of Congress and the beneficient purposes of this statute were it to heed the pleas of the defendants-appellants and refuse jursdiction of this cause? The innocent stakeholder, the plaintiff-appellee herein, who cares nothing at all about the contentions of the various claimants to the fund, would, because of these contentions, find itself deprived of the protection of the statute. For, once having declined jurisdiction, the District Court would be powerless to prevent this defendant from bringing an action on its claim in the New Jersey courts at the same time that the plaintiff-appellee is litigating the defendants-appellants claim to the fund in the New York courts. What, then, will preserve the stakeholder from the hazards of double liability on the one obligation? Or the vexation and expense of litigating these various claims to the one fund?

Indeed, where the jurisdictional facts appear, *i.e.* obligation of $500.00 or more, two or more adverse claimants, deposit of money by stakeholder in court, etc., the Federal District Court is under a duty to assume jurisdiction of the controversy. Certainly, in a case such as the facts reveal this to be, it has no discretion in the matter. It must assume jurisdiction.

The case of *Maryland Casualty Co.* v. *Glassell-Taylor & Robinson*, 156 F. 2d 519 (5 Cir. 1946) discussed the question of the duty of the Court where the jurisdictional facts

appeared. That was an action in the nature of interpleader by a surety company on contractor's performance bond against obligee and other persons making claims thereunder. Before the commencement of the Federal Interpleader action a concursus proceeding had been commenced in the Louisiana court involving the same parties and the same obligation. In reversing the District Court's judgment dismissing the complaint because of the prior concursus proceeding, the Court of Appeals said:

> "The Federal Interpleader Statutes and Rule 22, Federal Rules of Civil Procedure, were not designed merely to prevent a multiplicity of suits and to protect the stakeholder from multiple liability but they were also intended to require all interested parties to come in and set up their claims in one case, so as to prevent it only from being a race to the swift where a creditor who had a large claim and the means by which to prosecute it might promptly secure judgment against the stakeholder in another state and by a prior execution consume the entire amount of the bond, to the exclusion and detriment of creditors having small claims or inadequate means by which to collect them. The Interpleader Statute was also designed to afford a means of process by which claimants to a fund, who live in other states, may be called and required to litigate in one court to the end that all claimants to the fund, as well as the holder of the fund, may be given protection.
>
> "We consider it important that the usefulness of the statutory remedy of Interpleader, which has been greatly enlarged by the Interpleader Act of 1936 and by Rule 22 of the Federal Rules of Civil Procedure, should not be impaired by narrow and restrictive rulings. In such cases where jurisdiction clearly appears Federal Districts Courts do not have the right to decline to exercise that jurisdiction in litigation involv-

ing no important question of the public policy of the State. (Citing McClellan v. Carland, 217 U. S. 268, at Page 281; Chicot County v. Sherwood, 148 U. S. 529; Meredith v. Winter Haven, 320 U. S. 228.)"

Were not the foregoing considerations determinative of the Court's duty in the premises, the fact that the offer to pay this defendant's claim was conditioned on this defendant's assigning its interest in the bond and second mortgage to the defendant, Marie M. Constant, removes any possible vestige of doubt on this question. This defendant very properly rejected such a condition because it believes that such offer was the result of collusion between the other defendants with the objective of prejudicing this defendant in its attempts to collect the moneys due to it on its third mortgage indebtedness. Were this defendant to accept such an offer the defendant-appellant, Klepper, a New York resident, would have in his hands better than $16,000.00 which he proposes to distribute to various unsecured creditors of the late Menander T. Constant who are clients of his and also residents of New York. The other defendant-appellant, Schnur, has already commenced a foreclosure of his first mortgage on the Ocean Township property with the objective of wiping out this defendant's liens on the same and, at the same time, for all practical purposes, extinguish the debt represented by this defendant's third mortgage lien, for the estate of Menander T. Constant is hopelessly insolvent. This defendant claims the equitable right, under the familiar rule of marshalling assets, to see that the proceeds of the insurance policy are paid to those creditors who, in equity, are entitled to them. It does not intend to permit the defendant-appellant, Klepper, to dispose of these funds in a manner to suit himself and in violation of his trust and it is confident that no court will compel it to do so.

This defendant further objected to the offer of payment on the ground that the defendant, Marie M. Constant, was

not entitled in law or equity to such assignment in the event of payment. Whatever interest she had in such policy as revocable beneficiary terminated when the decedent exercised his right to revoke her appointment as beneficiary and substituted the defendant-appellant, Schnur, in her stead "as mortgagee" and when the assignment, absolute in form but subject to the trust agreement, was made to the defendant-appellant, Klepper, it is the contention of this defendant that the proper party to receive such assignment in the event of payment would be the Estate of Menander T. Constant.

POINT V

(Answering Appellants' Argument)

It is impossible to avoid impugning the good faith of the defendants-appellants in pressing this appeal after you have read their brief. Not only did they deliberately omit to reproduce, in their appendix, the letter from the defendant-appellant, Klepper, to the Constants, setting forth the fiduciary nature of the assignment of the policy to the said Klepper, which letter was attached to and expressly made part of the affidavit of Alexander J. Alexander, Vice-President of this defendant corporation, filed in this cause and which they otherwise reproduced, but they have not cited one case which can truthfully be said to support the principles and rules of law which they are asking this Court to adopt in its decision in this case.

In their brief (page 4) they cite *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941) as authority for the proposition that "where a State court first acquires control of the *res*, the Federal Courts are disabled from exercising any power over it by injunction or otherwise." The question there presented to the Court and answered was whether a federal court could enjoin a proceeding in *personam* in a State court on the ground that the claim in

controversy had been previously adjudicated by the federal court. Not only is this case no authority for the proposition cited by appellants but the Supreme Court, in the course of its opinion, (pp. 133-134) expressly recognized the fact that, in interpleader actions, the federal courts may issue injunctions enjoining defendants "from instituting or prosecuting any suit or proceeding in any State court or in any other federal court".

In this connection *Palmer* v. *Texas*, 212 U. S. 118 (1908) is also cited; but this case was not an interpleader action and it was decided years before the passage of the Federal Interpleader Act.

Then the case of *Mosely* v. *Sunshine Biscuits*, 170 Fed. Supp. 164 (W. D. Mo. 1952) is cited on page 4 of their brief for the proposition that, in an interpleader action, the Federal Court in one State has no jurisdiction over a defendant in another State unless such defendant waives the defense of lack of jurisdiction. Here, again, is another instance of a case cited with intent to mislead. This case, an interpleader action, was decided on the ground that neither of the defendants (claimants) was a resident of the district where the suit was filed. Since by the statute conferring jurisdiction (Sec. 1397, Title 28 U. S. C. A.) the Congress put the venue of such cases "in the judicial district in which one or more of the claimants reside" the Court dismissed the bill because one of the defendants refused to waive this jurisdictional requirement by submitting himself to the jurisdiction of the Court. The defendants-appellants have artfully neglected to call to this Court's attention that, upon rehearing (reported in 110 Fed. Supp. 157) when it appeared that one of the defendants, Sunshine Biscuits, Inc. was licensed to do business in Missouri and, consequently, was a resident of Missouri for purposes of venue under the Interpleader Act, the Court reversed its judgment, reinstated the complaint and took jurisdiction of the action.

Then, on page 5 of their brief, *Hagan* (miscited Hogan) v. *Central Ave. Dairy, Inc.*, 180 F. 2d 502 (9 Cir. 1950) is cited also to support the proposition that an out-of-state defendant must waive the defense of jurisdiction over his person in order to give the Federal court jurisdiction in an interpleader action, and, in addition, as authority for the proposition that, in interpleader actions, the process of the District Court does not run countrywide. This case is authority in no sense for either of these propositions. In fact, it is authority for the very reverse of these propositions. Therein, a Title Insurance and Trust Company brought an interpleader action against Hagan and the Dairy Company in the Federal Court in Southern California on a dispute arising out of an escrow transaction. Service was made upon the Dairy Company in Arizona but it filed no answer nor made any appearance in the interpleader suit. Hagan filed a cross-claim against Dairy Company asking for money damages and alleging that the claim for them grew out of the same contract which was the subject matter of the escrow deposit. Central Dairy appeared specially and objected to the Court's jurisdiction over it with regard to this cross-claim. The District Court dismissed the cross-claim and an appeal was taken. The Court of Appeals held that the cross-claim could not be maintained, saying:

> "We think that the District Court of California did not have personal jurisdiction over the absent non-consenting Arizona corporation except to the extent of that corporation's interest in the escrow fund. That the Court had jurisdiction that far is clear from the statute. * * * The absentee defendant was not before the Court here. The Court could adjudicate rights in the fund but could affect no other interest of the absentee."

Nor is the case of *Flanagan* v. *Marvel*, 94 Fed. Supp. 145 (D. Minn. 1950)—cited on page 4 of their brief, of any

help to the defendants-appellants on this question of jurisdiction. Therein the proceeding in the State Court sought to be enjoined was concededly in *rem* and the statutes of Minnesota gave the State Court ample power to grant full and complete relief to all the parties having an interest in the *res*. The case involved the settlement and distribution of an estate and it requires no extensive citation of authority to show that such a proceeding is strictly in *rem*. See Corpus Juris, Title, Executors and Administrators, Vol. 23, Sec. 27 and *Michigan Trust Company* v. *Ferry*, 175 Fed. 166 (rev. on other grounds 228 U. S. 346).

CONCLUSION

In the light of all the facts in this case and in the failure of the defendants-appellants to cite any reliable authority whatever to support their challenge to the jurisdiction of the District Court, it is respectfully urged that the order under appeal should be affirmed and, in view of the obviously frivolous character of this appeal, with costs and counsel fees to this defendant to be paid by the defendants-appellants personally and not out of the fund.

Respectfully submitted,

ABE A. SCHULTZ,
Attorney and Counsel for Defendant,
Tanner Associates, Inc.

EUGENE P. KENNY,
On the Brief.

APPENDIX

Letter of February 8, 1956, Annexed to Affidavit Submitted by Defendant Tanner Associates, Inc.

February 8, 1956

Mr. Menander T. Constant
79 Lincoln Avenue
Elberon, New Jersey.

Dear Mr. Constant:

I have this day received an assignment of policy and the appointment of beneficiary, together with the original life insurance policy issued by the Manufacturers Life Insurance Company, policy #1,254,339, which I will hold in escrow until the repayment in full of a first mortgage to Edward Schnur and a second mortgage to Abraham and Tillie Weiner.

It being understood that said policy together with the assignment and appointment of beneficiary will be returned to you upon full payment of both of said mortgages.

In the event that there is a default under either of said mortgages, then and in that event the proceeds of said insurance policy shall be used in payment of the balance that may be then due under said mortgages; and, any other balance then remaining shall be delivered to your estate in full.

It being further understood that in the event that you fail to make any premium payment, that I may on behalf of either or both of said mortgagees, make said payment and hold you responsible therefor.

Very truly yours,

/s/ Albert Barnett Klepper
Albert Barnett Klepper

Accepted

/s/ Menander T. Constant
Menander T. Constant

/s/ Marie M. Constant
Marie M. Constant

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No. 1048

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IN THE

Supreme Court of the United States

October Term, 1958

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Respondent,

AGAINST

ALBERT BARNETT KLEPPER and EDWARD SCHNUR,

Petitioners,

AND

TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALBERT BARNETT KLEPPER
AND
EDWARD SCHNUR,
Petitioners.

BY ANDREW J. DRITSAS,
Attorney.

ALBERT BARNETT KLEPPER,
on Petition.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

THE MANUFACTURERES LIFE INSURANCE COMPANY,
Respondent,

AGAINST

ALBERT BARNETT KLEPPER and EDWARD SCHNUR,
Petitioners,

AND

TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Albert Barnett Klepper and Edward Schnur, pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Third Circuit, filed April 25, 1958, which affirmed the judgment of the United States District Court for the District of New Jersey, entered on December 9, 1957 in favor of the Manufacturers Life Insurance Company, as plaintiff, interpleading the defendants, and enjoining the pending action in the Supreme Court of the State of New York, County of Kings.

The courts below did not file an opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on April 25, 1958. It is printed in full in the Appendix, *infra*, pages 9-10. The Circuit Court has in effect decided that the interpleader compact between the State of New Jersey and New York is unconstitutional under the 14th Amendment of the United States Constitution and, its decision is in conflict with the Civil Practice Act of the State of New York, Sections 285, 286 and 287. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U. S. C. A. Section 1254(1).

Question Presented

Does the Supreme Court of New York in view of the Interpleader compact between the State of New York and the State of New Jersey possess the constitutional power to obtain the requisite personal jurisdiction over all the claimants?

Statutes Involved

Federal Constitution, Section 10, Article 1;

Sections 1335, 1397, and 2361;

Federal Constitution, Amendment XIV;

Title 28, U. S. C. A.;

Sections 285, 286 and 287 of the Civil Practice Act of the State of New York.

Statement of the Case

The basis of federal jurisdiction in the District Court was the claim of The Manufacturers Life Insurance Company that the Supreme Court of New York did not possess the constitutional power to obtain the requisite personal jurisdiction over all the claimants, so that the relief of interpleader which the New York Supreme Court might give would be adequate and complete.

At the outset we point out that The Manufacturers Life Insurance Company in its complaint alleged that its funds were attached by the petitioner Albert Barnett Klepper, prior to the institution of the action in the District Court, in a pending action in the Supreme Court of the State of New York, County of Kings.

The Courts below, on the sole basis that the District Court was the only court which afforded ample relief, divested the Supreme Court of the State of New York from its jurisdiction.

We point out that the cases cited by all parties in the court below, did not involve, what petitioners claim to be the controlling fact viz.: a state compact between the State of New York and the State of New Jersey.

The state compact with consent of Congress, authorized by the Federal Constitution (Section 10, Art. 1) has been resorted to in recent years for more effective and uniform interstate action by the states in the absence of Congressional regulation.

Reasons for Granting the Writ

1. The decision below narrows and constricts applicable decisions of this Honorable Court and is probably in conflict with them.

2. The decision below conflicts with decisions in Courts of Appeal of other Circuits and with District Court decisions.

3. Uniformity is required and necessitates a controlling decision by this Honorable Court.

4. The decision of the court below is erroneous.

The court below disregarded the fact that the State of New York and the State of New Jersey are both parties to an interpleader compact, giving the Supreme Court of the State of New York personal jurisdiction of all the parties to this suit.

Section 287 New York Civil Practice Act was cited under Appellant's first point with the argument that the State Court first acquired control of the res, and, the state interpleader action afforded ample relief in a binding action, and is part of the Interpleader Compact entered into "to promote comity and judicial cooperation" between the State of New York and the State of New Jersey "to relieve from undue risk and uncertainty, a person who may be subject to double or multiple liability because of the existence of adverse claimants, one or more of whom *in the absence of this compact* may not be subject to the jurisdiction of the adjudicating court, when such person makes all reasonable efforts to secure judicial determination and discharge of his liability."

(Section 287, New York Civil Practice Act, Sd. 1 and 2.) Under subdivision 2c of the interpleader compact it is provided that "Interpleader shall mean a judicial procedure by which two or more persons, who have adverse claims against a third person may be required to litigate these claims in one proceeding"; and under subdivision 3 service of process sufficient to acquire personal jurisdic-

tion is provided for within the states which are parties to the compact; and under subdivision 5 provides for finality of judgment wherein it states that "no judgment obtained against any person in any action to which he had become a party by reason of service of process effected pursuant to the provisions of this compact shall be subject to attack on the ground that the adjudicating court did not have personal jurisdiction over such person."

The decision below conflicts with *United States* v. *Bank of New York*, 296 U. S. 463 where at page 477, the court stated:

> "The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has actually been seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where to give effect to its jurisdiction, the Court must control the property."

Decisions in other Circuit and District Courts are also inconsistent with the results herein.

On January 20, 1958 the United States Court of Appeals, 2nd Circuit in the case of *National Cancer Hospital of America* v. *Webster* (Docket #24758, not yet reported) Mr. Justice Hand stated:

> "The object of the statute is to afford a new form of relief where needed, not to furnish a new choice of tribunals, or to draw into federal courts the adjudication of causes properly cognizable by courts of the states."

In *Flanagan* v. *Marvel*, 94 Fed. Supp. 145, the plaintiff's interpleader was dismissed on the ground that the state interpleader action afforded ample relief to a stakeholder, and there was no equitable basis for a Federal Court assuming jurisdiction, and stated at page 148: "where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the court's jurisdiction. *Kline* v. *Burke Construction*, 260 U. S. 229, 43 S. Ct. 79, 82."

Since 1890 the National Conference of Commissioners on State Laws has promoted uniformity by State Legislation, where diversity of treatment is an interstate evil.

See: A Study in Interstate Adjustments, The Compact Clause of the Constitution (Frankfurter and Landis, 34 Yale L. J. 685).

This Court has itself often recognized the importance of adjusting relations in this field.

In *Kane* v. *New Jersey*, 242 U. S. 160, 37 Sup. Ct. 30, at 167-168 per Brandeis, J.

> "The Maryland law contained a reciprocal provision by which non-residents whose cars are duly registered in their own states are given for a limited period free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes convenience of owners and prevents the relative hardships of having to pay the full registration fees for a brief use of the highways. It has become common in legislation."
> * * *
> "There is nothing to show that the requirement is unduly burdensome in practice. It is not a dis-

crimination against non-residents, denying them equal protection of the law. On the contrary it puts non-resident owners upon an equality with resident owners."

The general rule is well settled that legislation which, in carrying out a public purpose is limited in its application, if within the sphere of its operation affects alike all persons similarly situated, is not within the prohibition of the Fourteenth Admendment." (American Jurisprudence, Vol. 12, Sec. 477.)

State Tax Comm. v. *Jackson*, 283 U. S. 527, 51 S. Ct. 540;
Truax v. *Corrigan*, 257 U. S. 312, 42 S. Ct. 124;
Mountain Timber Co. v. *Washington*, 243 U. S. 219, 37 S. Ct. 260;
Williams v. *Arkansas*, 217 U. S. 79, 30 S. Ct. 493;
Field v. *Barker Asphalt Paving Co.*, 194 U. S. 618, 24 S. Ct. 784.

A statute which requires personal service of summons upon resident owners of land and provides for constructive service by publication upon non-resident owners does not create an invalid discrimination.

Ballard v. *Henger*, 204 U. S. 241, 27 S. Ct. 261;
De Bean v. *Safe Deposit & T. Co.*, 233 U. S. 24, 34 S. Ct. 584;
Central Tran. & T. Co. v. *Campbell Co.*, 173 U. S. 84, 19 S. Ct. 346.

Apart from the foregoing judicial authorities, we refer the Court to the American Bar Association Journal, March 1958, Vol. 44,243 entitled "Shall we curtail diversity jurisdiction?"

The conflicts between the above cases and the case at bar is irreconciliable and should be resolved by this Honorable Court.

Conclusion

A matter of substantial importance, governed by federal law is presented herein.

On the basis of the authorities above set forth, the decision of the Court below appears to be in conflict with the decisions of other District Courts and Courts of Appeal for other Circuits, and with decisions of this Honorable Court.

Wherefore petitioner respectfully prays that this petition for a writ of certiorari should be granted.

Dated New York, May 7th, 1958.

Respectfully submitted,

ALBERT BARNETT KLEPPER,
AND
EDWARD SCHNUR,
Petitioners.

BY ANDREW J. DRITSAS,
Attorney.

ALBERT BARNETT KLEPPER,
on Petition.

Appendix

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,515

THE MANUFACTURERS LIFE INSURANCE COMPANY,

vs.

ALBERT BARNETT KLEPPER, EDWARD SCHNUR, TANNER ASSOCIATES, INC., and MARIE M. CONSTANT

ALBERT BARNETT KLEPPER and EDWARD SCHNUR, *Appellants.*

On appeal from the United States District Court for the District of New Jersey.

Present:

MARIS, KALODNER and HASTIE,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk

April 25, 1958

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JUN 6 1956
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IN THE

Supreme Court of the United States

No. 1048

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Respondent,

against

ALBERT BARNETT KLEPPER and EDWARD SCHNUR,

Petitioners,

and

TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,

Respondents.

BRIEF FOR RESPONDENT, THE MANUFACTURERS LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Newark 2, New Jersey.

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Statute Cited

28 U.S.C., §1335 (Federal Interpleader Act) 4, 5, 11

Counter-Statement of Questions Presented for Review

Did the United States Court of Appeals for the Third Circuit properly affirm the interlocutory judgment of interpleader entered in the District Court, where:

(a) There was diversity of citizenship among the various claimants to a fund of $25,000;

(b) One of the claimants had instituted an action against plaintiff in the Supreme Court of New York and had attached funds of the plaintiff on deposit in a New York bank; and

(c) All the defendants had been personally served with process.

Counter-Statement of the Case

Defendants Klepper and Schnur have petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals in the Third Circuit dated April 25, 1958, which affirmed the interlocutory judgment of interpleader entered by the United States District Court for the District of New Jersey on December 9, 1957.

The essential facts are stated in the complaint in interpleader, which petitioners did not print, but which is included in the appendix to this answer (Appendix A).

Briefly summarized, the facts are that the plaintiff insurance company issued a life insurance policy in the face amount of $25,000 on the life of one Menander T. Constant, who died on September 27, 1957. His wife, who is the defendant Marie M. Constant, was originally designated beneficiary. Prior to his death, the insured appointed the defendant Edward Schnur as beneficiary, and the insured and his wife executed a written assignment of the policy to the defendant Klepper. On the same day that the assignment of the policy was executed, Klepper wrote a letter to the insured acknowledging that he held the policy as assignee in escrow until the repayment in full of a first mortgage and a second mortgage. The defendant Schnur is the first mortgagee. The defendant Tanner Associates, Inc. is the assignee of the second mortgage.

Following the death of the insured, each of the defendants herein named made claim to the plaintiff insurance company for the whole or a part of the proceeds of the policy.

The plaintiff company is admitted to do business in New Jersey, but not in the State of New York. The policy in question was issued by plaintiff to a New Jersey resi-

dent. It was stated during the oral argument before the District Court that the mortgages, to secure which the policy was assigned, were executed by a New Jersey corporation largely owned by the insured. The real controversy lies between the defendant Schnur, the first mortgagee, and the defendant Klepper, the assignee of the policy, on the one hand, and the defendant Tanner Associates, Inc., the second mortgagee, on the other, with regard to their respective rights to the security afforded by the proceeds of the life insurance policy.

Defendant Klepper brought suit against the plaintiff insurance company in the New York Supreme Court to recover the proceeds of said life insurance policy. Inasmuch as plaintiff is not amenable to personal service in the State of New York, since it does not do business there, Klepper attached a bank account of the plaintiff in the First National City Bank of New York.

In order to protect itself against the competing claims, the plaintiff thereupon instituted the present action of interpleader in the United States District Court for the District of New Jersey, in accordance with 28 U.S.C. §1335, and deposited therein the proceeds of the policy amounting to $25,000. Two of the defendants, Klepper and Schnur, reside in New York; defendant, Marie M. Constant, is a citizen and resident of New Jersey, and defendant, Tanner Associates, Inc., is a New Jersey corporation.

Upon the filing of the complaint and the deposit of the fund of $25,000 into the Registry of the District Court, Judge WORTENDYKE entered the usual order to show cause, upon the return of which was entered the interlocutory judgment of interpleader, which is printed *infra* (Appendix B).

The defendants Klepper and Schnur appealed from the interlocutory judgment of interpleader to the United States

Court of Appeals for the Third Circuit. The argument of said appeal took place on April 25, 1958. At the conclusion of the appellants' argument, and without calling upon counsel for the appellees, the Court of Appeals immediately announced its affirmance of the order under appeal. This is the decision which the petitioners would now ask this Court to review.

ARGUMENT

POINT I

The judgments below were properly in accord with 28 U. S. C. §1335.

Before this Court, petitioners do not challenge the proposition that the plaintiff insurance company was, under the facts and circumstances here presented, entitled to the remedy of interpleader. Rather, their whole contention, as we understand it, is that the insurance company is required by the Federal Constitution to have sought such remedy by way of a counterclaim in interpleader in the action which Klepper had brought against it in the Supreme Court of New York, Kings County. Such contention is without merit for three reasons:

1. The U. S. District Court unquestionably had jurisdiction under 28 U.S.C. §1335, which is the Federal Interpleader Act.

2. At the time the instant Federal interpleader action was instituted:

   (a) no interpleader action was pending in the New York Supreme Court;

   (b) nor were defendants Schnur, Constant or Tanner Associates, Inc. before the New York

Supreme Court or named as parties in the proceeding therein pending.

3. The attachment by Klepper of the funds of the insurance company on deposit in a New York bank did not prevent the U. S. District Court in New Jersey from exercising its jurisdiction under the Interpleader Act.

It should be observed that the only parties to the proceeding in the New York Supreme Court are Klepper and the insurance company. It should also be noted that no counterclaim in interpleader has as yet been filed by the insurance company in the New York Supreme Court action, so that none of the other three claimants to the fund is presently before the New York Supreme Court.

Petitioners do not and can not dispute the proposition that the facts here fall squarely within the provisions of the Federal Interpleader Act, 28 U.S.C., §1335, and that the courts have held that where a stakeholder shows such facts, his right to the remedy of interpleader is not discretionary with the court but is absolute.

Railway Express Agency v. *Jones*, 106 Fed. 2d 341 (7 Cir. 1939);

American-Hawaiian S.S. Co. v. *Bowring & Co.*, 150 Fed. Supp. 449, 453 (S. D. N. Y. 1957).

In the *Jones* case, the court held at 106 Fed. 2d 344:

"The mandatory requirements of the statute are:

(a) Two or more adverse claimants; (b) citizens of different states; (c) a fund in possession of party seeking to interplead, to which the two or more adverse claimants are making claim; (d) said sum exceeds $500.

"All these essential facts were disclosed in the bill of interpleader.

* * *

"Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section is absolute."

Since the United States District Court for the District of New Jersey had jurisdiction over the pending controversy, it was its duty to exercise it, even though (although we do not so concede) the New York Supreme Court might also have had jurisdiction to entertain the same action.

In *Hyde* v. *Stone*, 61 U. S. 170 (1857), CAMPBELL, *J.* said for the court at page 175:

"But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. * * * But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. (*Suydam* v. *Broadnax*, 14 Pet., 67; *Union Bank* v. *Jolly, Adm'r*, 18 How., 503.)"

In *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19 (1909), the court stated at page 49:

"When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens* v. *Virginia*, 6 Wheat. 264, 404, * * *. The right of a party plaintiff to choose

a Federal court where there is a choice cannot be properly denied. *In re Metropolitan Railway Receivership*, 208 U. S. 90-110; *Prentis* v. *Atlantic Coast Line et al.*, 211 U. S. 210."

In *McClellan* v. *Carland*, 217 U. S. 268 (1910), the court held at page 281:

> "* * * It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. *Chicot County* v. *Sherwood*, 148 U. S. 529, 534."

and at page 282:

> "The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different States the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case."

In *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943), Chief Justice Stone stated for the court at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts."

In *Ermentrout* v. *Commonwealth Oil Co.*, 220 Fed. 2d 527 (5th Cir. 1955), the court held at page 530:

> "The rule is well established that when action is in personam and involves a question of personal liability only, another action for the same cause in another jurisdiction is not precluded. *Kline* v. *Burke Construction Company*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077; *McClellan* v. *Carland*, 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762; *Byrd-Frost, Inc.* v. *Elder*, 5 Cir., 93 F. 2d 30, 115 A. L. R. 342. Therefore the pendency of a state court action in personam is no ground for abatement or stay of a like action in the federal court, although the same issues are being tried and the federal action is subsequent to the state court action. The federal court may not abdicate its authority or duty in favor of the state jurisdiction. *McClellan* v. *Carland*, *supra*; *Kline* v. *Burke Construction Company*, *supra*; *Byrd-Frost, Inc.* v. *Elder*, *supra*; *Aetna Life Insurance Company of Hartford* v. *Martin*, 8 Cir., 108 F. 2d 824."

Other cases to the same effect are:

Stanton v. *Embrey*, 93 U. S. 548 (1876);

Chicot County v. *Sherwood*, 148 U. S. 529, 534 (1893);

Kline v. *Burke Construction Co.*, 260 U. S. 226 (1922);

Commonwealth Co. v. *Bradford*, 297 U. S. 613 (1936);

Butler v. *Judge of U. S. District Court*, 116 Fed. 2d 1013, 1015 (9 Cir. 1941);

Parcell v. *Summers*, 126 Fed. 2d 390 (4 Cir. 1942); cert. den. 317 U. S. 640;

U. S. v. *1 Dozen Bottles*, 146 Fed. 2d 361, 363 (4 Cir. 1944);

In re President & Fellows of Harvard College, 149 Fed. 2d 69 (1 Cir. 1945);
Chicago, G. W. Ry. Co. v. *Beecher*, 150 Fed. 2d 394, 398 (8 Cir. 1945); cert. den. 326 U. S. 781;
Ira S. Bushey & Sons v. *Hedger Transp. Corp.*, 167 Fed. 2d 9, 15 (2 Cir. 1948); cert. den. 335 U. S. 816;
Romero v. *Weakley*, 226 Fed. 2d 399 (9 Cir. 1955);
Hinsdale etc. Co. v. *Norfolk etc. Co.*, 101 Fed. Supp. 19 (D. Mass. 1951);
Rosenblum v. *Trullinger*, 118 Fed. Supp. 394, 397 (E. D. Ark. 1954);
Lyons v. *Sanders*, 120 Fed. Supp. 392, 395 (W. D. Ky. 1954).

The rule of the foregoing cases is fully applicable here because interpleader, at least in its initial stages, as between the stakeholder and the claimants, is regarded as a proceeding *in personam* rather than one *in rem*.

N. Y. Life Ins. Co. v. *Dunlevy*, 241 U. S. 518 (1916);
Aetna Life Ins. Co. v. *De Roure*, 123 Fed. Supp. 736, 740 (S. D. N. Y. 1954);
U. S. v. *Coumantaros*, 146 Fed. Supp. 51 (S. D. N. Y. 1956);
Cross v. *Armstrong*, 44 Ohio St. 613, 10 N. E. 160, 165 (1887);
Washington Life Ins. Co. v. *Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123 (1898);
Expressmen's Ass'n v. *Hurlock*, 91 Md. 585, 46 Atl. 957 (1900);
Hanna v. *Stedman*, 230 N. Y. 326, 130 N. E. 566 (1921);
Rutherford v. *Union Land & Cattle Co.*, 47 Nev. 21, 213 Pac. 1045 (1923);

John Weis Inc. v. *Reed*, 22 Tenn. App. 90, 118 S. W. 2d 677 (1938).

See also:

In re Howard, 76 U. S. (9 Wall.) 175, 184 (1869);
Austin v. *Royal League*, 316 Ill. 188, 147 N. E. 106, 109 (1925).

Moreover, it has been specifically held that the issuance of a writ of attachment by one claimant against the funds of the stakeholder on deposit in a bank, does not bar the stakeholder from bringing an interpleader proceeding and securing an injunction of the attachment action.

Sanders v. *Fertilizer Works*, 292 U. S. 190, 199 (1934);
National Fire Ins. Co. v. *Sanders*, 38 Fed. 2d 212 (5 Cir. 1930);
Cramer v. *Phoenix Mutual Life Ins. Co.*, 91 Fed. 2d 141 (8 Cir. 1937); cert. den. 302 U. S. 739;
Loew's Inc. v. *Hoyt Management Corp.*, 83 Fed. Supp. 863 (S. D. N. Y. 1949);
National Fire Ins. Co. v. *Chambers*, 53 N. J. Eq. 468, 471, 32 Atl. 663 (Pitney, V. C. 1895).

The jurisdiction of a Federal court in interpleader may properly be exercised even though proceedings looking to the resolution of the same issues are already pending in the State courts.

Maryland Casualty Co. v. *Glassell-Taylor & Robinson*, 156 Fed. 2d 519 (5 Cir. 1946);
Austin v. *Texas-Ohio Gas Co.*, 218 Fed. 2d 739 (5 Cir. 1955);
O'Daniel v. *Porter*, 240 Fed. 2d 636 (App. D. C. 1957).

POINT II

No constitutional issue is properly presented to this Court.

In invoking the jurisdiction of this Court, the petitioners say at page 2 of their petition:

> "The Circuit Court has in effect decided that the interpleader compact between the State of New Jersey and New York is unconstitutional under the 14th Amendment of the United States Constitution * * *."

This argument was not advanced by the petitioners before the District Court, nor referred to in any way in their briefs before the United States Court of Appeals for the Third Circuit. The constitutional validity of the interpleader compact is not even inferentially raised in these proceedings. The question here is simply whether the District Court properly exercised the jurisdiction given it by the Federal Interpleader Act, 28 U. S. C., Section 1335. In no shape or form does the present proceeding raise any issue as to the constitutional validity of any interpleader compact between New Jersey and New York.

In any event, the constitutional argument should not be considered by this Court because it was neither raised nor decided below.

Owens v. *Union Pacific R. Co.*, 319 U. S. 715, 725 (1943);
U. S. v. *Fleischmann*, 329 U. S. 349, 365 (1950);
Ullmann v. *U. S.*, 350 U. S. 422, 439 (1956); reh. den. 351 U. S. 928.

CONCLUSION

In conclusion, therefore, the respondent, The Manufacturers Life Insurance Company, respectfully submits that the decisions below were in all things correct; that the facts presented a classic case for invoking the jurisdiction of the Federal Interpleader Act; that no question respecting the validity of an interstate interpleader compact is involved in this proceeding; that no constitutional questions are properly at issue; and that the petition for certiorari is so patently without merit that it should be speedily denied.

Respectfully submitted.

NICHOLAS CONOVER ENGLISH,
Counsel for Respondent, The Manufacturers Life Insurance Company.

Appendix A

Complaint in Interpleader

(Filed—November 19, 1957)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1145-57

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Plaintiff,

vs.

ALBERT BARNETT KLEPPER, EDWARD SCHNUR, TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,

Defendants.

Plaintiff, The Manufacturers Life Insurance Company, by way of complaint says that:

1. Plaintiff is a corporation existing under the laws of Canada and is duly qualified to transact the business of life insurance in the State of New Jersey.

2. Defendant Albert Barnett Klepper, upon information and belief, is a resident and citizen of the State of New York and maintains his office at 82 Wall Street, New York City. Defendant Edward Schnur is a resident and citizen of the State of New York and resides at 5114 Beverly Road, Brooklyn, New York. Defendant Tanner Associates,

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Inc. is a New Jersey corporation and is a citizen of New Jersey having its principal office at 880 Bergen Avenue, Jersey City, New Jersey. Defendant Marie M. Constant is a citizen and resident of New Jersey and resides at 80 Lincoln Avenue, Long Branch, New Jersey.

3. This action arises under 28 U.S.C. §1335.

4. Under date of July 22, 1953 plaintiff issued its policy No. 1,254,339 in the face amount of $25,000 on the life of Menander T. Constant as insured. Defendant Marie M. Constant, wife, was designated beneficiary.

5. Under date of February 8, 1956, the insured appointed as beneficiary "Edward Schnur, residing at 5114 Beverly Road, Brooklyn, New York, as first mortgagee." The said Edward Schnur is one of the defendants herein.

6. Under date of February 8, 1956, the said insured and defendant Marie M. Constant executed a written assignment of said policy to "Albert Barnett Klepper, Attorney at Law, 82 Wall Street, New York 5, New York." Said Albert Barnett Klepper is one of the defendants herein.

7. Under date of February 8, 1956 the defendant Albert Barnett Klepper executed a letter to the insured in which he said in part:

> "I have this day received an assignment of policy and the appointment of beneficiary, together with the original life insurance policy issued by the Manufacturers Life Insurance Company, policy #1,254,339, which I will hold in escrow until the repayment in full of a first mortgage to Edward Schnur and a second mortgage to Abraham and Tillie Weiner.

Appendix A

"It being understood that said policy together with the assignment and appointment of beneficiary will be returned to you upon full payment of both of said mortgages."

8. On September 27, 1957, the insured, Menander T. Constant, died.

9. Under date of October 9, 1957, Abraham Weiner and Tillie Weiner executed an assignment to defendant Tanner Associates, Inc. of all their "right, title and interest in and to the proceeds of insurance policy No. 1,254,339 issued by The Manufacturers Life Insurance Company on the life of Menander T. Constant, to whatever extent we may be entitled thereto, which policy is now held in escrow by Albert Barnett Klepper to secure the payment of a first mortgage held by Edward Finnur on the premises on which the within assigned mortgage is a second mortgage, and to secure the payment of the bond and mortgage assigned herein; * * *."

10. Defendant Albert Barnett Klepper as assignee of such policy, acting through his attorney Andrew J. Dritsas, Esq., of 82 Wall Street, New York 5, New York, has filed a complaint in the Supreme Court of the State of New York, County of Kings, against the plaintiff seeking recovery of the proceeds of said life insurance policy. The said action is entitled "Albert Barnett Klepper, Plaintiff, against The Manufacturers Life Insurance Company, Defendant" and bears Index No. 13922, Year 1957. Inasmuch as plaintiff is not qualified to do business in the State of New York and has no agent for the service of process in the State of New York, the said Klepper has attached a bank account of the plaintiff in the First Na-

tional City Bank of New York, 55 Wall Street, New York 15, New York.

11. Defendant Tanner Associates, Inc., acting through its attorney, Eugene P. Kenny, Esq., of Jersey City, New Jersey, has demanded that plaintiff pay it the sum of $8,225.83, representing its interest in the proceeds of said policy.

12. Defendant Marie M. Constant, acting through her attorney, Nathaniel W. Franzblau, of Newark, New Jersey, has made claim to plaintiff of an interest in said policy.

13. Plaintiff herewith tenders into court the sum of $25,000, representing the proceeds payable under said policy.

14. Plaintiff is unable to determine the respective interests of the defendants in the proceeds of said policy, and has no adequate remedy at law save by resort to the equitable powers of this Court under 28 U.S.C. §1335.

WHEREFORE, plaintiff demands:

A. That this Court issue its process for all defendants.

B. That this Court enter its order restraining and enjoining defendant Albert Barnett Klepper, his agents and attorneys, from prosecuting or otherwise proceeding with his action in the Supreme Court of the State of New York, County of Kings, entitled "Albert Barnett Klepper, Plaintiff against The Manufacturers Life Insurance Company, Defendant" and bearing Index No. 13922, Year 1957" until the further order of this Court, and directing him to release from

attachment the funds of plaintiff in the First National City Bank, New York, New York.

C. That this Court enter its order restraining and enjoining the defendants, and each of them, their respective agents and attorneys, from instituting or prosecuting any proceeding in any state or United States court affecting said policy No. 1,254,339, or the proceeds thereof, until the further order of this Court.

D. That upon procuring the defendants to interplead herein, the plaintiff be discharged of all further liability with respect to said policy No. 1,254,339 or the proceeds thereof.

E. That plaintiff be awarded a counsel fee and its costs to be taxed.

McCarter, English & Studer
Attorneys for Plaintiff
11 Commerce Street
Newark 2, New Jersey
By: James R. E. Ozias,
A Member of the Firm

Appendix B

Interlocutory Judgment of Interpleader

(Filed—December 9, 1957)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1145-57

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Plaintiff,

vs.

ALBERT BARNETT KLEPPER, EDWARD SCHNUR, TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,

Defendants.

This matter coming on to be heard on the return of the order to show cause herein dated November 19, 1957, and upon due notice to the defendants, and good cause appearing.

IT IS ORDERED, on this 9th day of December, 1957, on motion of McCarter, English & Studer, attorneys for plaintiff:

1. That the defendants interplead.

2. That the plaintiff be and it hereby is discharged from all further liability with respect to Policy No. 1,254,339, issued by plaintiff under date of July 22, 1953 on the life of Menander T. Constant, as insured, or the proceeds thereof.

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3. That defendant Albert Barnett Klepper, his agents and attorneys, be and they hereby are permanently enjoined and restrained from prosecuting the action now pending against plaintiff in the Supreme Court of the State of New York, County of Kings, which action is entitled "Albert Barnett Klepper, Plaintiff against The Manufacturers Life Insurance Company, Defendant" and which bears index No. 13922, Year 1957.

4. That defendants Albert Barnett Klepper, Edward Schnur, Tanner Associates, Inc., and Marie M. Constant, and each of them, their officers, agents and attorneys, be and they hereby are permanently enjoined and restrained from instituting or prosecuting any proceeding in any state or United States court affecting said Policy No. 1,254,339 or the proceeds thereof.

5. That plaintiff be allowed a counsel fee of Five Hundred Dollars to be taxed out of the fund in court, and that the Clerk of this Court be and he hereby is directed to pay said counsel fee out of the funds deposited in the registry of this Court to the plaintiff's attorneys, McCarter, English & Studer.

WORTENDYKE
U.S.D.J.